United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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For the Second Circuit.

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS, as Co-Guardians of MIGUEL ANGEL JUNCO, JR., an Infant under the age of 14 years, and LILIAM JUNCO, as Administratrix and Personal Representative of the Estates of MIGUEL A. JUNCO and ALINA S. JUNCO, Deceased, and MIGUEL ALMANDO JUNCO, HERMINIA JUNCO, GUILLERMO SUAREZ-SOLIS and MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,

Plaintiffs-Appellants,

v.

EASTERN AIR LINES, INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

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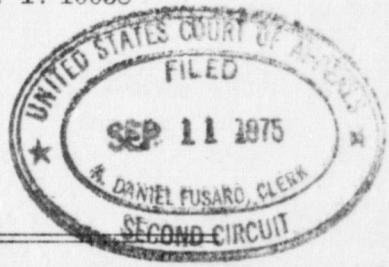

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United States Court of Appeals

For the Second Circuit.

Docket No. 75-7329

LILIAM JUNCO and GUILLERMO SUAREZ-SOLIS, as Co-Guardians of Miguel Angel Junco, Jr., an Infant under the age of 14 years, and LILIAM JUNCO, as Administratix and Personal Representative of the Estates of Miguel A. Junco and Alina S. Junco, Deceased, and Miguel ARMANDO JUNCO, HERMINIA JUNCO, GUILLERMO SUAREZ-SOLIS and MARIA PATRICIA ADELAIDE SUAREZ-SOLIS,

Plaintiffs-Appellants,

v.

EASTERN AIR LINES, INCORPORATED,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S BRIEF

Statement of the Issue

Whether the Court below properly refused to apply the law of Florida to the issue of plaintiffs' measure of recoverable damages where Florida's only interest in the damage issue was based upon the fact that (1) the accident occurred there, and (2) defendant's principal place of business was located there, *whereas* New York's interests

on the issue of plaintiffs' damages is that at the time of the accident each decedent was a domiciliary of New York; each of their estates is pending in New York; the Administratrix of each estate is domiciled in New York; each decedent was employed in New York; decedents' infant son and plaintiff herein was and still is domiciled in New York; the infant's co-guardian is domiciled in New York; decedents entered into their relationship with defendant in New York by the purchase of their air transportation tickets from defendant here; and their round trip flight began in New York and was to be their ultimate destination?

Statement of the Case

This action arises out of the crash of an Eastern Air Lines L-1011 jet aircraft while on a landing approach to the Miami International Airport, Miami, Florida, on December 29, 1972 (16a ¶ II).* Miguel A. Junco and his wife Alina A. Junco died in the accident. Their baby son, Miguel A. Junco, Jr., less than a year old at the time (8a), who was also aboard the aircraft, sustained personal injuries in the accident.

This action was commenced in the United States District Court for the Southern District of New York on January 11, 1973 (1a). Wrongful death damages are sought for the deaths of Miguel and Alina Junco. Damages are also sought for the personal injuries sustained by the infant plaintiff (7a). By order of the Judicial Panel on Multidistrict Litigation dated July 9, 1973, this action was transferred pursuant to 28 U.S.C. § 1407 to the U.S. District Court for the Southern District of Florida (2a), over plaintiffs' counsel's strenuous objections, for the purpose of pretrial discovery proceedings before the Honorable Peter J.

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* References are to pages of the Joint Appendix.

Fay, U.S.D.J. At the completion of discovery proceedings and just prior to trial a stipulation was entered wherein Eastern Air Lines admitted liability for compensatory damages (16a ¶ II; 19a ¶ 16). Thereafter, and upon the specific application of the attorneys for the within plaintiffs, this action was remanded back to the U.S.D.C. for the Southern District of New York for trial (3a 4/26/74) on the only remaining issue—plaintiffs' damages.

At the time of the accident the decedents, Miguel A. Junco and his wife Alina S. Junco, and their baby son, age 11 months, were domiciliaries of New York. The estate of each decedent is pending in the Surrogate's Court, Queens County, New York (9a). The Administratrix of each estate, Liliam Junco, is domiciled in New York. The infant son is still domiciled in New York where he lives with his aunt and grandparents. The infant's Guardian was also appointed by the Queens County Surrogate's Court (8a ¶ 3) and is domiciled in New York. At and prior to the time of the accident both of the decedents were employed in New York. Decedents obtained and purchased their round trip air transportation tickets from Eastern Air Lines in New York. Their trip originated in New York and the ultimate destination of the decedents and their infant son was New York.

Defendant Eastern Air Lines, Inc. is a Delaware corporation having its principal place of business in Florida (17a ¶ 8). However, Eastern's General Executive Offices are located in New York City at 10 Rockefeller Plaza. In fact, Eastern conducts extensive business and flight operations in New York City and at its major airports, J.F.K. International and LaGuardia Airports.

The only issues to be tried are those spelled out in the pre-trial order, namely damages (29a ¶ IX and 30a ¶ X).

With respect to the New York law of damages as compared with the Florida law, there does not appear to be any

question but that the laws of New York and Florida are similar with respect to personal injuries. However, there are some differences in the state laws with respect to damages recoverable in actions for wrongful death. Simply stated the difference, insofar as this action is concerned, appears to relate primarily to the area of the Florida law which permits minor children of the decedent to recover for: ". . . mental pain and suffering from the date of injury." Fla. Stat. § 768.21(3) (See, page 30 Appellant's Brief). New York law does not allow such damages, *Campbell* v. *Westmoreland-Farm, Inc.*, 403 F.2d 939, 940 fn. 1 (2d Cir. 1968).

The only other area of difference between the two wrongful death statutes, as it is relevant in this action, is that Florida permits a decedent's parents to recover even when the decedent is survived by a minor child, Fla. Stats. § 768.20 and § 768.18(1). However, in New York, when a decedent is survived by an infant child and no spouse it appears that decedent's parents do not share in the recovery, 17B McKinney's Consol. Laws of N.Y., Estates, Powers and Trust Law, §§ 5-4.1, 5-4.4 and 4-1.1(a)(6).

Other than these two areas of the laws of New York and Florida relating to damages recoverable in wrongful death actions there is little, if any, real difference between them. Both States allow full recovery of damages without any limitation as to amount. Both are compensatory in nature and are designed primarily to compensate a decedent's next-of-kin ("survivors" in Florida and "distributees" in N.Y.) for the pecuniary losses sustained by them.

It is in that area of the law of Florida with respect to awards for "mental pain and suffering" which plaintiffs' attorneys seek to enforce because New York Courts have consistently refused to permit juries to speculate in these areas. Judge Knapp, in his unreported Memorandum Order applying New York law in this action (32a) relied upon and adopted the views he expressed on the applicable

law in *Gordon* v. *Eastern Airlines, Inc.,* 391 F. Supp. 31 (SD NY 1975). *Gordon* also arose out of the same accident and involved the death of a husband leaving surviving a wife and two infant children. Judge Knapp applied New York law on the issue of damages in the *Gordon* case. He did so simply because Florida had no interest whatsoever in the application of its law to the issue of damages. Judge Knapp said in *Gordon* that the issue of plaintiff's damages

> ". . . is of no concern to Florida, for it could have no interest whatsoever in how much money a New York jury would award a New York resident in a New York Court." 391 F.Supp. at 33

Those views are equally valid in the instant Junco case, for the reasons hereinafter stated.

ARGUMENT

Summary of Argument

Before the law of any State can be properly applied to a particular issue before the Court it must be demonstrated that that State has a legitimate interest in that issue, that it is an interest which is clearly identifiable and relevant to its resolution and that it is superior to the interest of any other State on that specific issue. Plaintiffs have not shown that Florida has *any* interest in the damage issue, let alone a legitimate, identifiable or relevant interest in that issue. Therefore, the Court below properly refused the application of Florida law on the issue of plaintiffs' damages.

POINT I

The Court below properly applied the law of New York to the issue of plaintiffs' damages because New York is the only State which has an identifiable, relevant and legitimate interest in the resolution of that issue.

Since jurisdiction of the District Court is based upon diversity of citizenship 28 U.S.C. § 1332 (see 7a ¶ 1; 19a ¶ 15) it is elemental that the Court is bound faithfully in its determination of the issue herein to apply the law of New York, *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), including New York's choice of law rules, *Klaxon Co.* v. *Stentor Electric Mfg. Co.,* 313 U.S. 487 (1941); *Nolan* v. *Transocean Airlines,* 365 U.S. 293 (1961); *Gore* v. *Northeast Airlines, Inc.,* 373 F.2d 717, 720 (2d Cir. 1967); *Rosenthal* v. *Warren,* 475 F.2d 438, 440 (2d Cir. 1973), and New York's public policy, *Griffin* v. *McCoach,* 313 U.S. 498 (1941).

Under the law of New York the choice of law problem here involved must be resolved by an examination of the respective interests which New York and Florida have with this controversy. This is for the purpose of determining which of those jurisdictions has the *paramount interest* in the application of its law. See, *Matter of Crichton,* 20 N.Y.2d 124, 133-134 (1967). As the Court of Appeals noted in *Miller* v. *Miller,* 22 N.Y.2d 12, 16 (1968):

> ". . . this process requires us 'first to isolate the issue, next to identify the policies embraced in the laws in conflict, and finally to examine the contacts of the respective jurisdictions to ascertain which has a . . . superior interest in having its policy or law applied.'"

As to the first step, i.e., "to isolate the issue" it should be noted that this appeal does *not* involve any issue concerning the defendant's conduct or the standard of care im-

posed upon it. The Court of Appeals said in *Babcock* v. *Jackson,* 12 N.Y.2d 473, 483 (1963):

> "It is hardly necessary to say that Ontario's interest is quite different from what it would have been had the issue related to the manner in which the defendant had been driving his car at the time of the accident. Where the defendant's exercise of due care in the operation of his automobile is in issue, the jurisdiction in which the allegedly wrongful conduct occurred will usually have a predominant, if not exclusive, concern. In such a case, it is appropriate to look to the law of the place of the tort so as to give effect to that jurisdiction's interest in regulating conduct within its borders, and it would be almost unthinkable to seek the applicable rule in the law of some other place.
>
> "The issue here, however, is not whether the defendant offended against a rule of the road prescribed by Ontario for motorists generally or whether he violated some standard of conduct imposed by that jurisdiction, but rather whether the plaintiff, because she was a guest in the defendant's automobile, is barred from recovering damages for a wrong concededly committed. . . ."

and at page 484:

> "Where the issue involves standards of conduct, it is more than likely that it is the law of the place of the tort which will be controlling but the disposition of other issues must turn, as does the issue of the standard of conduct itself, on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented."

As in *Babcock,* the instant action involves no issue pertaining to the manner in which defendant's vehicle was operated or flown or whether it offended against some duty of care imposed upon it by the State of Florida. The issue of defendant's conduct is no longer present. That issue

has been determined by defendant's admission of its *liability* for compensatory damages, *supra.*

The sole issue in this case, therefore, is simply the measure of plaintiffs' damages.

As to this issue the New York Court of Appeals has recently had occasion to determine the question of which State had the predominant interest as to the issue of damages in a wrongful death action, the State where the aircraft crashed and where defendant airline's principal place of business was located, or the State where plaintiff and decedent resided and where the estates were pending and where the beneficiaries were located. In *Thomas* v. *United Air Lines, Inc.,* 24 N.Y.2d 714 (1969) cert. den. 396 U.S. 991, the Court said, at 724:

> " 'The predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages, if any, for their injuries or their decedent's death.' "

To the same effect, see *Kilberg* v. *Northeast Airlines,* 9 N.Y.2d 34 (1961); *Long* v. *Pan American World Airways, Inc.,* 16 N.Y.2d 337 (1965); *Gore* v. *Northeast Airlines, Inc.,* 373 F.2d 717 (2d Cir. 1967); *In re Air Crash Disaster at Boston, Massachusetts, on July 31, 197* (Delta Airlines), —— F.Supp. —— (D.C. Mass. August 21, 1975, MDL Docket No. 160, Caffrey, C.J.); *Manos* v. *Trans World Airlines,* 295 F. Supp. 1166 (ND Ill. 1969).

The next step is "to identify the policies embraced in the laws in conflict," *Miller* v. *Miller, supra,* 22 N.Y.2d at 16. The policies of New York and Florida with respect to wrongful death damages are practically identical. Each allows full damages; neither limits the amount recoverable; actions under each statute are required to be brought by

the personal representative of the decedent's estate; damages recovered are compensatory in nature and are for the benefit of decedent's close relatives. They differ, as the Court of Appeals observed in *Long* v. *Pan American*, with respect to Pennsylvania and Maryland:

> "... only in their views as to the class of persons who can sue and the extent to which they have suffered compensable damages as the result of a wrongful death." 16 N.Y.2d at 342.

Such views represent and express the policy of each State. Florida permits mental pain and suffering to an infant for the wrongful death of a parent, Fla. Stat. § 768.21(3). New York does not, *Arnold* v. *State*, 163 App. Div. 253 (1914); *Horton* v. *State*, 50 Misc. 2d 1017 (1966); *Campbell* v. *Westmoreland-Farm, Inc.*, 403 F.2d 939, 940, fn. 1 (2d Cir. 1968). Florida permits the parents of a decedent to share in the recovery even when infant children survive decedent, Fla. Stats. §§ 768.18(1), 768.20. New York does not, New York E.P.T.L., 17B McKinney's Con. Laws §§ 5-4.1, 5-4.4 and 4-1.1(a)(6). However, the fact that their views might be different to that extent does not mean they are in conflict. As Professor Currie said:

> "Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policies, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states."

B. Currie, *Selected Essays on the Conflict of Laws*, 153 (1963). Although the two potentially concerned states have different laws, there is still no problem in choosing the applicable rule of law where only one of the states has an interest in having its law applied. Comment, *False Conflicts*, 55 Cal.L.Rev. at p. 77; Cavers, *The Choice of Law Process* (1965) pp. 89-90.

What then are the "superior interests" of Florida to warrant the application of its policy and law? *Miller* v. *Miller, supra,* at 16. Florida's only connection with the damage issue is: (1) the accident occurred in Florida, and (2) defendant's principal place of business is in Florida.* The New York Court of Appeals has never considered either of these "interests" sufficient to warrant the application of the *lex loci delicti* to the issue of plaintiffs' damages. This has been the law beginning with *Kilberg* v. *Northeast Airlines, supra.* The place of the accident has been termed "fortuitous" in *Kilberg, supra,* in *Thomas, supra,* and in *Romero* v. *International Terminal Operating Co.,* 358 U.S. 354, 384 (1959); the place of the accident has also been termed a "purely adventitious circumstance" in *Babcock* v. *Jackson, supra; Long* v. *Pan American World Airways, supra;* and as one involving the "merest lateral chance", *Farber* v. *Smolack,* 20 N.Y.2d 198 (1967). In each of those cases the Court held that such factor was insufficient to warrant the application of the *lex loci delicti.*

Florida's only other "interest", i.e., that defendant Eastern Air Lines' principal place of business is located

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* The parents of the deceased wife, Alina Junco, were domiciled in Florida at the time of the accident. For this reason the lower court applied Florida law to their claims (33a). This ruling was completely contrary to this Court's decision in *Gore* v. *Northeast Airlines, Inc., supra. Gore* held that "the domicile of the passenger on the plane is the important consideration . . . and the domiciles of the passenger's beneficiaries are irrelevant . . ." 373 F.2d at 722. *Gore* also rejected the application of the law of California, the domicile of two possible beneficiaries, on the ground that they were emancipated at the time of the accident and that their pecuniary losses were minimal. The Court then observed that "under these circumstances New York would not recognize any California interest superior to its own." 373 F.2d at 725 (It should be noted that these Florida parents have already testified by deposition that they received no monetary support from their daughter and never anticipated any). Moreover, under both the law of Florida and New York the proper party plaintiff is the personal representative of decedents' estates and such representative, Liliam Junco, Administratrix of each estate, represents all the beneficiaries' interests in this action. See, *Gore* v. *Northeast Airlines, Inc.,* 373 F.2d at 725.

there, is likewise insufficient to warrant the application of its law in the instant action. In *Kilberg* v. *Northeast Airlines, supra,* the airline defendant was *incorporated* in Massachusetts, the State of the accident was "the home office of the airline." *Miller* v. *Miller* N.Y.2d at 30. Nevertheless, the Court rejected the application of Massachusetts law because "the New York courts do not regard this contact of any particular significance . . . where compensation for injury or death of a person is the subject of the litigation [citations omitted]" *Gore* v. *Northeast Airlines, supra,* 373 F.2d at 725. See, also, *Long* v. *Pan American World Airways, supra,* 16 N.Y.2d at 342-343, wherein the Court held that the circumstance that the defendant was incorporated in one State was insufficient to warrant the application of the laws or public policy of that State.

Thus, the only non-fortuitous interest attributable to Florida in the instant action has been specifically rejected by the New York Court of Appeals as insufficient to warrant the application of such law. And properly so when it is considered that defendant Eastern Air Lines is a corporation which operates nationally and nationwide into many cities and communities. Under such circumstances the place of its incorporation (Delaware) or where it has been judicially determined that it maintains its principal place of business, Florida, *Herschel* v. *Eastern Airlines,* 216 F.Supp. 347 (SD NY 1963), should have no impact on tort damage issues (as opposed to intra-corporate matters); besides, corporations doing business in the state are for certain purposes treated as residents in any event. Cf. Leflar, *American Conflicts of Law,* § 14 (1968).

Florida is, therefore, totally without interests in what a New York jury would award New York domiciliaries in a New York court. The fact that in some respects its own wrongful death statute may be considered more generous does not give it a legitimate interest which New York should recognize. In fact, in other important respects

Florida's death statute is *less* generous than New York's.* Thus, *if* this action involved a death claim by a surviving spouse who had remarried since the accident, would not plaintiffs' counsel be condemning the Florida law as "depriving" his client, instead of praising it as they do in the instant action?** More to the point, would the New York Court of Appeals apply the more generous provisions of the Florida death statute in one case and reject the less generous provisions in another? Obviously not. See, *Neumeier* v. *Kuehner,* 31 N.Y.2d 121, 126 (1972). Such a provincial and *ad hoc* approach to the problem of the choice of laws would be totally inconsistent with the latest attempt made by the New York Court of Appeals in *Neumeier* to develop choice of law rules which will "assure a greater degree of predictability and uniformity, . . ." 31 N.Y.2d at 127. Further developing this principle the Court said, at 31 N.Y.2d at 128:

> "Now that these values and policies have been revealed, we may proceed to the next stage in the evolution of the law—the formulation of a few rules of general applicability, *promising a fair level of predictability.*" [Emphasis added]

Although in *Neumeier* the Court of Appeals formulated three rules or principles "for situations involving guest statutes in conflict settings" *id.* at 128, there is no reason why the Court's desire for "the formulation of a few rules

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* See, e.g., Fla. Stat. § 768.21, which allows the introduction into evidence of the remarriage of decedent's spouse. In New York such evidence is inadmissible; see, e.g., *Duffy* v. *City of New York,* 16 Misc.2d 1015, rev'd on other grounds, 7 A.D.2d 988; *Lees* v. *N.Y. Consol. R. Co.,* 109 Misc. 608, aff'd 193 App.Div. 882; *Rodak* v. *Fury,* 31 A.D.2d 816; *Ludy* v. *State,* 30 A.D.2d 993, aff'd 25 N.Y.2d 773.

** In fact, in another wrongful death action arising out of this same accident which is presently pending in the Southern District of New York (*Stark* v. *Eastern Air Lines, Inc.,* Civil Action No. 73 Civ. 2328) the plaintiff widow remarried after the accident. Mr. Broder, who is representing Mrs. Stark, is contending that *New York* law applies to that case.

of general applicability, promising a fair level of predictability" should not apply equally to issues involving plaintiff's measure of damages.

Indeed, it would appear that the New York Court of Appeals has already formulated such rules of general applicability concerning wrongful death damages and that such rules have in fact achieved a better than fair level of predictability. Such is the import of *Kilberg; Long; Miller* and *Thomas* and those decisions of this Court which have followed them; see, e.g., *Pearson* v. *Northeast Airlines,* 309 F.2d 553 (2d Cir. 1962 en banc); *Gore* v. *Northeast Airlines,* 373 F.2d 717 (2d Cir. 1967); *Rosenthal* v. *Warren,* 475 F.2d 438 (2d Cir. 1973).

The one overriding factor in each of those decisions is the total absence of any legitimate interest of the State where the accident occurred in the issue of the amount of damages the New York beneficiaries were entitled to recover in their New York action. In fact, in two cases, *Long* and *Thomas,* the Court applied the law of decedents' domiciles even though those domiciles were not in New York.

The plaintiff-appellant contends that the lower court's application of New York law amounts to no more than a return to the "wooden" rule of the *lex loci delicti,* as applied to domicile. This of course is not correct. It is true that in most of the New York cases, where the sole issue involved the question of the amount of plaintiff's damages, the Courts applied the law of the domicile of decedent and, when the same, his beneficiaries. However, such application of the law of the domicile was not an "invariable" or "mechanical" application of such law, as was the pre-*Kilberg* application of the *lex loci delicti.* In each case the law of the domicile was applied because of (1) the total lack of interest of the State in which the accident occurred, and (2) the overriding concern of the State of decedent's domicile with the measure of damage issue. See, *Gore* v. *Northeast Airlines,* 373 F.2d at 724-725. In other words, the law of decedent's domicile was not applied in any

mechanical or "wooden" manner but only after the interests of the State in which the accident occurred were analyzed and weighed, and then compared with the interest of the State in which the decedent, his estate and beneficiaries were located. It was only after such interests were compared that the New York courts came to the inevitable conclusion that the State in which the accident occurred so lacked any interest in the issue of plaintiff's damages that there was in fact no conflict at all. Thus, as Professor Currie said (Selected Essays on Conflict of Laws (1963) p. 189):

> "When one of two states related to a case has a legitimate interest in the application of its law and policy and the other has none, there is no real problem; clearly the law of the interested state should be applied."

One may ask whether the fact that certain features of the Florida death statute may be more generous than New York's death statute would give Florida an interest it would not ordinarily have, as in the instant action, in the application of its measure of damages to a nondomiciliary of Florida. One answer to such an inquiry was given by Judge Knapp in *Gordon* v. *Eastern Airlines,* 391 F.Supp. 31, 33 (SD NY 1975):

> "The answer to that question is of no concern to Florida, for it could have no interest *whatsoever* in how much money a New York jury would award a New York resident in a New York court. *Its only possible concern would be in what its own residents recover,* a situation not now before us."

Another answer to that question is that Florida itself would not give its own residents the benefit of a more generous law, *even when the more generous law is its own law.* See, *Hopkins* v. *Lockheed Aircraft Co.,* 201 So.2d 749 (Fla. 1967) wherein the Supreme Court of Florida,

in a wrongful death action brought in Florida involving an airline crash in Illinois, applied to its own residents the then $30,000 wrongful death limitation on damages in the Illinois wrongful death statute.

If, then, Florida has no interest in providing a more generous measure of damages to its own domiciliaries what interest does Florida have in providing more generous damages to nondomiciliaries? Clearly, it has no such interest. Without such an interest there can be no conflict with the law of New York, which allows plaintiffs a full and fair recovery for the damages sustained. And the application of New York law to these plaintiffs would conform to what was sought to be achieved in *Babcock* v. *Jackson,* 12 N.Y.2d at 481-482, "Justice, fairness and 'the best practical result' . . . by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties has the greatest concern with the specific issue raised in the litigation." And as the Court further observed:

> "The merit of such a rule is that 'it gives to the place 'having the most interest in the problem' paramount control over the legal issues arising out of a particular factual context' and thereby allows the forum to apply 'the policy of the jurisdiction 'most intimately concerned with the outcome of [the] particular litigation'."

To apply Florida law here for no other reason than because some may think that it is a better law or a more generous law would not advance any interest of New York. Conversely, the failure to apply New York law under the circumstances of the within action would certainly impair

> " 'the smooth working of the multi-state system [and] produce great uncertainty for litigants' by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile." *Neumeier* v. *Kuehner,* 31 N.Y.2d at 129.

POINT II

Response to Points in Brief of Plaintiffs-Appellants.

A.

In point I of their brief plaintiffs contend that New York has no interest in "depriving" plaintiffs of a recovery in this action. Plaintiffs assume of course that they are in fact being "deprived" of something. Undoubtedly they mean that because New York does not recognize (1) "mental pain and suffering" as part of its scheme of wrongful death damages or (2) a recovery by decedent's parents when the decedent is survived by infant children, they, the plaintiffs, are somehow "deprived." Other similar references are made, e.g., that the effect of the "substitution" of New York damage law is to "completely extinguish" any recovery of the New York parents and to "diminish severely" the infant's recovery (Appellants' Brief, p. 7, second paragraph); and that the lower court's action in "arbitrarily displacing" Florida law results in the "total destruction of *any* right of recovery of New York domiciliaries for the wrongful death of their decedent." (Appellants' Brief p. 9 last paragraph; Emphasis added).

In setting forth this rather extreme view of the effect of the decision below it is obvious that plaintiffs' counsel is *assuming* that Florida has a legitimate interest in the application of its laws to the issue of damages in this case. Plaintiffs have not identified, however, any interest Florida has in this issue, legitimate or otherwise. Obviously, Florida has no such interest; see Point I, *supra*.

What plaintiffs overlook is that the matters they are complaining about represent the public policy of their own domicile. It is the public policy of New York, as embodied in its wrongful death act, that damages for mental suffering and grief are too speculative for juries to consider and that the parents of deceased should not share in a re-

covery where the decedent is survived by infant children. Such variables in the type of recoverable damages and in the class of beneficiaries entitled to share in such damages are commonplace in the wrongful death statutes of the several states, see, e.g., Speiser, *Recovery for Wrongful Death* (1966 Lawyers Co-op), §§ 3:1-3:3, 3:32, 3:36, 3:42, 3:45, 3:53; see, also Chapter 10. But the fact that they are different does not necessarily mean that they are in conflict with one another, particularly in the instant action where the laws of both Florida and New York permit a full and fair recovery.

Plaintiffs seek to avoid the impact of Florida's total lack of interest in the damage issue by arguing that the case of *Neumeier* v. *Kuehner,* 31 N.Y.2d 121 (1972) commands the application of the *lex loci delicti,* Florida. Plaintiffs overlook the fact that the Court in *Neumeier* was deciding an issue involving the *standard of care* a host owed to a guest, and that the three principles which were proposed by the Court

> ". . . were proposed . . . for situations involving guest statutes in conflict settings . . ." 31 N.Y.2d at 129

There was not the slightest indication in *Neumeier* that the "normally applicable" rule (i.e., application of the *lex loci delicti*) was intended to apply to the issue of the measure of plaintiffs' recoverable damages. Under the circumstances of the within case the "predominant interests to be served on the issue of damages are those of the states containing the people or estates which will receive the recoverable damages . . ." *Thomas* v. *United Air Lines, supra,* 24 N.Y.2d at 724, and not that of the State in which the crash fortuitously occurred.

B.

In Point II of Appellants' Brief (p. 10) plaintiffs' attorneys contend that Florida law should apply because of

"the very strong New York policy against wrongful death limitations in connection with New York domiciliaries in multi-state tort settings" (see Point II headnote, p. 10 Appellants' Brief). However, nowhere does plaintiffs' counsel identify the "limitations" applicable to the issues in the within action. If they are referring to the fact that it is the policy of New York not to allow damages for grief nor to permit parents of a deceased a recovery when infant children are surviving, then plaintiffs' attorneys are in effect arguing that it would be against the public policy of New York for a New York Court to apply New York law to its own domiciliaries because New York may not be as generous in some respects as the laws of the State in which the accident occurred. Yet, that is precisely what they argue when they contend that the application of New York law to these New York plaintiffs is "unfair [and] unjust" (Appellants' Brief, p. 11). If that is true the N. Y. Legislature should be informed.

Plaintiffs' attorneys point to the case of *Dedek* v. *Eastern Air Lines* (settled prior to trial), which case arose out of the same accident involved herein. While the law of Florida was held applicable to *Dedek* by Judge Fay of the U.S.D.C., S.D. of Florida, it was applied to *Dedek* because that action was *originally commenced* in the U.S. District Court for the Southern District of Florida and Judge Fay was bound by the *Erie* and *Klaxon* doctrines to apply Florida law, which law applies the *lex loci delicti* to such actions, *Hopkins* v. *Lockheed Aircraft Co., supra.* However, the application of Florida law in *Dedek,* because Judge Fay was *Erie* bound to do so, did not require Judge Knapp to also apply the Florida law. This is because plaintiffs' attorneys commenced the within *Junco* action in the U.S.D.C. for the Southern District of New York. Having done so, Judge Knapp was also bound by the *Erie* and *Klaxon* doctrines to apply the law of the State in which his Court is located; but in this case that State is New York. New York of course has long since

rejected the mechanical application of the *lex loci delicti,* represented by Florida's *Hopkins* v. *Lockheed* decision, in favor of the approach employed by the Court of Appeals in *Babcock* v. *Jackson,* and its progeny. Following this approach Judge Knapp found that New York had the only interest in the issue of plaintiffs' damages (32a); *Gordon* v. *Eastern Air Lines, Inc., supra.**

Plaintiffs' reliance on *Hurtado* v. *Superior Court,* 114 Cal. Rptr. 106, 522 P.2d 666 (1974), is misplaced. In that case a Mexican citizen sued a California citizen in California in an action to recover damages for wrongful death. The accident causing the death occurred in California. Mexico's death statute contained a monetary limit of $1,946.72; California's death statute contained no limit. The California Supreme Court determined that the only purpose of the Mexican death limitation was for the protection of local, *i.e.,* Mexican, defendants. However, since plaintiff's claim was not against a Mexican defendant, but rather against a California defendant, Mexico, therefore, had no interest in what amount of money a California Court would award *against a California defendant.* The Court did not, as plaintiffs contend (Appellants' Brief, p. 13) apply California law because it was the place of the accident nor did it reject the Mexican law because it was the plaintiff's domicile. Rather, its application of California law was based upon the Court's analysis of the interest of

* Plaintiffs' attorneys could have avoided the application of New York law in this action if they had originally commenced this case in Florida, as was done in the *Dedek* case. Shortly after this accident an article entitled: "Everglades Air Disaster: Should the suits be filed in New York or Florida?", appeared on the front page of the January 25, 1973 New York Law Journal. It pointed out quite emphatically that Florida permitted the recovery of damages to a minor for grief sustained as a result of the death of a parent. Shortly thereafter, Mr. Broder, one of the attorneys for plaintiffs herein, commented on said article in his own "Trial Tactics And Techniques" column in the N. Y. Law Journal. After the conclusion of pre-trial discovery in Florida the attorneys for plaintiff specifically requested Judge Fay to remand this case back to the S.D. of New York.

both Mexico and California in the issue and the Court's determination, after weighing those interests, that Mexico had no interest protecting a non Mexican defendant.

Apparently attempting to draw some analogy from the *Hurtado* case, plaintiffs' attorneys inquire how Florida treats its "resident" defendant; they respond that the answer is found in the *Dedek* case because in that case Florida applied its own law to defendant Eastern Air Lines. However, their analogy falls flat on its face because, as previously pointed out, Judge Fay applied Florida law because he was bound by the *Erie* and *Klaxon* doctrines to apply Florida law, including its conflict of laws rule. Since Florida follows and applies the *lex loci delicti*, *Hopkins* v. *Lockheed, supra,* and since the accident occurred in Florida, Judge Fay had no choice but to apply that law. However, Judge Knapp did not apply Florida law because the same doctrines which *compelled* Judge Fay to apply Florida law in *Dedek* permitted Judge Knapp to apply New York law, after weighing the interests of each of the States connected with the issue.

C.

In Point III of Appellants' Brief (p. 15) its headnote contends that the lower court failed to give proper recognition to Florida's public policy. However, as previously pointed out, "the scope of policy is limited by the *legitimate interests* of the respective states." (Emphasis added.) Curry, *Selected Essays on the Conflict of Laws,* 153 (1963). In other words, it makes no difference what the public policy of Florida is if it does not have any legitimate interest in the issue to be decided.

On pages 15-18 of their brief plaintiffs totally ignore this Court's holding in *Rosenthal* v. *Warren,* 475 F.2d 438 (2d Cir. 1973), and proceed to hold aloft this Court's dictum in footnote 8 of that decision as if it were in fact the holding of the case. *Rosenthal* involved the wrongful death of a New York domicile in a Massachusetts hospital while under

the care of a Massachusetts doctor. This Court held that in "our considered view" New York would refuse to apply the Massachusetts limitation on wrongful death damages, 475 F.2d at 445. However, the Court noted in footnote 8 that *if* the case presented the converse fact situation, where the decedent was a Massachusetts domiciliary and the defendant doctor and hospital were New York based, it would be by no means clear that a New York court would apply the Massachusetts limitation. For in addition to the purpose of affording adequate compensation to those New York domiciliaries who suffer wrongful demise, the Court noted that the unlimited nature of the possible recovery in New York "can be said to deter resident doctors and medical facilities from acts of malpractice. Thus New York would have an interest in regulating the conduct of the tortfeasors . . ." *id.* at 445. This hypothetical supposition and obvious dictum is, quite amazingly, referred to by plaintiffs' attorneys as "The Rosenthal rule [which is] eminently just, correct and sensible." (Appellants' Brief p. 17 next to last paragraph), notwithstanding the fact that the Court actually applied the law of the decedent's *domicile,* New York, to the issue of plaintiff's damages.

Overlooked (or ignored) by plaintiffs' attorneys is this Court's observation in *Rosenthal,* that with respect to the issue of plaintiff's damages the New York Court of Appeals has invariably looked to the law of the decedent's domicile. 475 F.2d at 442-443, fn. 5.

On page 18 of their brief appellants inquire: "What of Florida's *interest* in the instant case?" (Emphasis added). They then quote Section 768.17 of the Florida Death Statute (Legislative Intent) which sets forth what the *public policy* of Florida is. However, as noted earlier by Professor Currie, the application of a state's policy is limited by the legitimate interest it has in the issue involved. Florida's public policy is not a substitute for a "legitimate interest" in the issue to be resolved. Without such an interest its public policy becomes irrelevant.

Appellants next advance the proposition that New York will apply renvoi considerations in its interest analysis approach to choice of law problems. That is, the New York courts in looking to the interest of Florida with respect to a certain issue will also look to Florida's own choice of law rule and, according to plaintiffs' attorneys, follow that rule. In support of this desperate grab they cite *Chance* v. *E. I. DuPont De Nemours & Co., Inc.*, 371 F.Supp. 439 (ED NY 1974), a rather unique case involving the claims of thirteen children injured in twelve unrelated accidents which occurred over a four-year period in ten different states. The plaintiffs were citizens of the states in which they received their injuries. There were six corporate defendants all incorporated and having their principal place of business in States other than those States of which plaintiffs were citizens.

Judge Weinstein observed that the choice of law to be applied to the question of joint liability was a question of first impression. After noting that in such a developing area of choice of law the New York courts' decisions in guest statute cases afforded little guidance in the resolution of the applicable law to the issue of defendants' joint liability. The Court therefore determined that the interests of the states where the various accidents occurred (which was in each case the state of the respective plaintiff's residence) would each have the substantial interest in the question of joint liability and the law to be applied to that issue. 371 F.Supp. at 446. Plaintiffs' contention that *Chance* involved renvoi considerations is completely contrary to Judge Weinstein's specific holding, that the New York Court of Appeals has rejected "any mechanical renvoi doctrine upon an interest analysis." *Id.* at 447. See, also, *Tyminski* v. *United States*, 481 F.2d 257, 268 (3d Cir. 1973).

On page 22 of their Brief, Appellants' attorneys seemingly contend that in some manner the case of *Rosenthal* v. *Warren*, 374 F.Supp. 522 (SD NY 1974), supports their

position. After this Court's remand to the District Court the defendant hospital was permitted to amend its answer the issue was liability, i.e., defendant's charitable immunity. The Court held that Massachusetts' interest in preserving immunity was "so minute that New York courts would find it totally outweighed by its own." 374 F.Supp. at 529. Defendant then attempted to distinguish this Court's decision in *Rosenthal* on the ground that it involved the issue of plaintiff's damages whereas in the District Court case the issue was liability, i.e., defendant's charitable immunity. *Id.* at 529. The District Court, Bauman, D.J., said that since New York courts did not make such a distinction there was no reason why he should. Judge Bauman noted further that *Babcock* v. *Jackson, supra,* itself involved a statute which precluded liability rather than limited liability. *Id.* at 529. Defendant is at a loss to understand why appellants believe that Judge Bauman's decision is helpful to them. Actually, the opposite is true because his decision stands for the proposition that even in cases involving the issue of defendant's *liability* the courts will apply the law of decedent's domicile where it is shown that the state in which the accident occurred has little or no interest in the resolution of that issue.

In further support of appellants' theory that New York has no interest in *destroying* a cause of action of its own domiciliary or that Judge Knapp's ruling completely *destroys the right of recovery** of the New York domiciled parents, appellants rely on the case of *Oltarsh* v. *Aetna*

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* It is difficult to appreciate how a "right" or a "cause of action" can be destroyed by New York, or Judge Knapp, when in fact such a "right" or "cause of action" never existed under New York law. The New York parents might as well complain of the fact that third cousins or great uncles are also "deprived." Section 5-4.4, New York, E.P.T.L. provides that damages recovered in a wrongful death action "shall be distributed to the persons entitled thereto under 4-1.1. . . ." Section 4-1.1 provides

(footnote continued on following page)

Insurance Co., 15 N.Y.2d 111 (1965). In that case a New York resident who was injured in Puerto Rico commenced a direct action against the insurer on her return to New York. Such an action was authorized under Puerto Rican law but not permitted under New York law. The Court of Appeals held that New York's public policy proscribing direct actions against insurance companies had no relevance under the facts of the case. The Court noted that there would be no objection in suing an insurance company for its own breach of contract or commission of a tort, and that the plaintiff should not be denied a right to a jury trial simply because his adversary happens to be an insurance company. 15 N.Y.2d at 118. *Oltarsh* decided that New York would provide a *forum* for plaintiff's direct action against the insurer, even though New York had no similar legislation, and that permitting such suit would not contravene any New York public policy.

No New York interest was involved. In fact, plaintiff's cause of action was necessarily based upon the Puerto Rican statute because it *created* a cause of action against the insurer, and New York had no similar statute. The Court held that since Puerto Rico is the jurisdiction having the most significant relationship with respect to the matter in dispute, "its law should be applied . . . —*unless* there is some local public policy which prohibits our courts from assuming jurisdiction of the suit." 15 N.Y. 2d at 117-118. Since the Court found none, the Puerto Rican direct action statute was permitted to be sued upon in New York. The basis of the application of Puerto Rican law was not merely because it was the place where the injury occurred;

(*footnote continued from preceding page*)

that the property of a decedent not disposed of by will shall be distributed as follows:

"(a) If a decedent is survived by:

* * *

(6) Issue, and no spouse, the *whole* to the issue per stirpes." [Emphasis added]

there is more to the decision than that simple explanation. In fact, the Court indicated that the Puerto Rican statute could be applicable to injuries occurring outside of Puerto Rico since there was "no concrete clue to legislative intention concerning its reach . . ." with respect to such injuries. 15 N.Y.2d at 116. It is submitted, therefore, that *Oltarsh* has little if any bearing on the issue involved in the instant litigation.

Appellants' attorneys conclude their Brief with the threat that unless the Court applies the law of the State providing the largest recovery, forum shopping will result. This threat appears to bear out the New York Court of Appeals' fears in *Neumeier* v. *Kuehner, supra,* to the effect that a failure to apply the law of the State having the superior interest in the issue involved

> ". . . would 'impair . . . the smooth working of the multi-state system [and] produce great uncertainty for litigants' *by sanctioning forum shopping and thereby allowing a party to select a forum which could give him a larger recovery than the court of his own domicile.*" 31 N.Y.2d at 129 [Emphasis added]

Appellants' attorneys' constant and repetitious contentions that plaintiffs are being "deprived", that their "rights" are "destroyed," etc., are nothing more than a self-righteous pose to cover the fact that all they are really seeking is—*more.*

There can be no quarrel with the fact that the laws of their own State, New York, will provide the designated beneficiaries with a full and fair recovery, without monetary limit of any kind, for the damages sustained.* There

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* See, e.g., *Gordon* v. *Eastern Air Lines, Inc., supra.* The *Gordon* case was tried under the law of New York. The jury verdict, with the interest allowed under the New York death act, amounted to $954,500.00. Moreover, New York juries have not been unsympathetic to infants seeking damages for the wrongful death of both parents. *Zaninovich* v. *American Airlines, Inc.,* 47 Misc.2d 584 (Sup.Ct. 1965).

can be no doubt that New York's policy is to protect its citizens with a just recovery, *Neumeier* v. *Kuehner,* 31 N.Y.2d 121, 125; *Mackendrick* v. *Newport News Shipbuilding & D.D. Co.,* 302 N.Y.S.2d 124, 140 (Sup.Ct. 1969). As this Court said in *Rosenthal* v. *Warren,* 475 F.2d at 446:

> "The New York policy favors 'a just recovery' and 'principles of fair play', . . . that is to say, the 'just, fair and practical result'."

Fair play should apply to both parties.

It cannot be said that it is the policy of New York to *enhance* a recovery to its own residents whenever the law of a foreign State is thought to be more generous on a particular issue. Indeed, to hold that it is would clearly violate the New York principles of "fair play" and a "just" recovery. After all, there are very good reasons why New York should protect its residents from unjust foreign laws. However, it would serve no New York interest to impose upon its local employers and members of its business community a penalty of paying greater damages for no other reason than the fact that the law of another State may be more generous than New York's own law. The New York Court of Appeals in *Neumeier* noted this when it observed that it should not apply the law of a particular State "simply because some may think it is a better rule." 31 N.Y.2d at 126-127. Thus, the Court in *Neumeier* saw nothing wrong in applying the less generous law of plaintiff's domicile to the issue involved because the plaintiff's domicile had the paramount interest in the resolution of that issue.

It is true of course that in applying New York law to its own citizens New York, in a sense, extends a right which may be less generous (depending on the specific issue) than Florida would extend to such citizen suing in Florida for an accident occurring in Florida. However, as *Neumeier* explains, in answer to a similar contention:

> "That, though, is not a consequence of invidious discrimination; it is, rather, the result of the existence of disparate rules of law in connection with the litigants and the litigated issue." 31 N.Y.2d at 127

It is respectfuly submitted, therefore, that to apply the law of Florida to the issue of damages in the within action, in view of the total lack of Florida interest in this issue, would: (1) encourage and sanction the very forum shopping *Neumeier* feared and plaintiffs' counsel threatened; (2) allow a party to select a law which could give him a larger recovery than the law of his own domicile; (3) impair the smooth working of the multi-state system and produce great uncertainty for litigants; and (4) arbitrarily discriminate against a nondomiciliary in favor of a domiciliary in violation of the due process, equal protection and privileges and immunities clauses of the United States Constitution.

CONCLUSION

For all the reasons set forth above the Court should affirm the order of the lower Court and apply the law of New York to all plaintiffs' claims for damages on the trial of this action.

Respectfully submitted,

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(58590)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LILIAM JUNCO AND GUILLERMO SUAREZ-SOLIS, ETC., ET AL.,

Plaintiffs-Appellants,

vs.

EASTERN AIR LINES, INCORPORATED,

Defendant-Appellee.

State of New York,
County of New York,
City of New York—ss.:

DAVID F. WILSON, being duly sworn, deposes and says that he is over the age of 18 years. That on the 11th day of September, 1975, he served three copies of Brief for Defendant-Appellee on F. Lee Bailey and Aaron J. Broder, Esqs the attorneys for Plaintiffs-Appellants by delivering to and leaving same with a proper person in charge of their office at 350 Fifth Avenue in the Borough of Manhattan, City of New York, between the usual business hours of said day.

David F. Wilson

Sworn to before me this
11th day of September, 1975.

Courtney J. Brown

COURTNEY J. BROWN
Notary Public, State of New York
No. 31-5472920
Qualified in New York County
Commission Expires March 30, 1976